

**UNITED STATES DISTRICT COURT
DISTRICT OF MINNESOTA**

Edina Realty, Inc.,

Civil No. 04-4371 JRT/FLN

Plaintiff,

v.

RULE 26(f) REPORT

TheMLSonline.com, Inc.

Defendant.

The counsel identified below participated on behalf of their clients in the meeting required by Fed.R.Civ.P. 26(f), on November 9, 2004, and prepared the following report.

The pretrial conference in this matter is scheduled for December 10, 2004, at 9:00 a.m. before United States Magistrate Judge Franklin L. Noel in Room 9W, Federal Courts Building, 300 South 4th Street, Minneapolis, Minnesota. The parties do not request that the pretrial be held by telephone.

(a) Description of the Case

(1) Concise Factual Summary of Plaintiff's Claims;

Edina Realty, which provides real estate brokerage services, is the owner of the federally registered trademark, EDINA REALTY. Defendant, which also provides real estate brokerage services, infringes that mark by using the EDINA REALTY mark to lure internet consumers searching for Edina Realty to its theMLSonline.com website instead. Specifically, Defendant pays online search engines, such as Google and Yahoo, for the right to use the EDINA REALTY mark as a search term. Thus, when a consumer conducts an online search for EDINA REALTY on google.com or yahoo.com Defendant's online advertisement is the most prominent result.

This misleads consumers into believing that clicking on Defendant's advertisement will lead them to Edina Realty's website. However, clicking on Defendant's advertisement leads consumers to Defendant's website on which it offers real estate brokerage services that compete directly with Edina Realty. This practice infringes upon and dilutes Edina Realty's trademark and constitutes unfair competition and deceptive trade practice.

(2) Concise Factual Summary of Defendant's claims/defenses:

Defendant provides public access to a searchable database of all MLS listings in the Minneapolis/St. Paul metropolitan area at www.themlsonline.com, including MLS listings of homes offered by Plaintiff Edina Realty, Inc. Defendant uses Plaintiff's mark Edina Realty® to advise the public that the MLS listings which can be searched at www.themlsonline.com include homes offered for sale by Plaintiff Edina Realty, Inc. Defendant's use of Plaintiff's mark constitutes nominative fair use as (i) homes offered for sale by Edina Realty Inc. cannot be readily identified without use of the Edina Realty® mark, (ii) Defendant is using only so much of Plaintiff's mark as is reasonably necessary to advise the public that homes offered for sale by Edina Realty, Inc. are included in the MLS listings which can be searched at www.themlsonline.com, and (iii) Defendant does nothing which would cause consumers to be confused as to the origin or sponsorship of Defendant's website by Plaintiff.

The nature of Defendant's use of Plaintiff's mark does not constitute trademark infringement as consumers are not likely to be confused as to the origin or sponsorship of Defendant's website, and does not constitute dilution as Defendant is using Plaintiff's mark to reference services offered by Plaintiff.

(3) Statement of Jurisdiction (including statutory citations):

This is a civil action arising under the Lanham Act, 15 U.S.C. § 1051 *et seq.*, the Minnesota Uniform Deceptive Trade Practices Act, Minn. Stat. § 325D.43-48, and the common law of the state of Minnesota. This Court has jurisdiction over the subject matter of this action pursuant to 15 U.S.C. § 1121.

(4) Summary of Factual Stipulations or Agreements:

None.

(5) Statement of whether jury trial has been timely demanded by any party:

Plaintiff has timely demanded a jury trial.

(b) Pleadings

(1) Statement of whether all process has been served, all pleadings filed and any plan for any party to amend pleadings or add additional parties to the action:

All process has been served, all pleadings have been filed, and there is no current plan for any party to amend the pleadings or to add additional parties to the action.

(2) Proposed date by which all hearings on motions to amend and/or add parties to the action shall be heard:

01/10/05.

(c) Discovery Limitations

(1) The parties agree and recommend that the Court limit the use and numbers of discovery procedures as follows:

- (A) 30 interrogatories;
- (B) No Limit On document requests;
- (C) 3 factual depositions per side;
- (D) No Limit On requests for admissions;
- (E) N/A Rule 35 medical examinations;

(d) Discovery Schedule/Deadlines

(1) The parties recommend that the Court establish the following discovery deadlines:

- (A) 04/15/05 deadline for completion of non-expert discovery, including service and response to interrogatories, document requests, requests for admission and scheduling of factual depositions;
- (B) N/A deadline for completion of all Rule 35 medical examinations;

(e) Experts

The parties anticipate that they will require expert witnesses at time of trial.

- (1) The plaintiff anticipates calling 1 expert in the field of trademark law.
- (2) The defendant anticipates calling 1 expert in the field of trademark law.
- (3) The parties pursuant to Local Rule 26.3(a) recommend the disclosure and discovery option as follows:

See (4) below.
- (4) The parties recommend that the Court establish the following deadlines for disclosure of experts and experts' opinions consistent with Rule 26(a)(2) as modified by Local Rule 26.3:

(A) Deadlines for all parties' identification of expert witnesses (initial and rebuttal). (Fed.R.Civ.P. 26(a)(2)(A).)

Initial

Plaintiff's Experts: 05/20/05

Defendant's Experts: 05/30/05

Rebuttal

Plaintiff's Experts: 06/20/05

Defendant's Experts: 06/30/05

(B) Deadlines for completion of expert witness depositions, if any: 7/31/05.

(f) Motion Schedule

(1) The parties recommend that motions be filed and served on or before the following date:

(A) 09/01/05 non-dispositive motions;

(B) 09/01/05 dispositive motions.

(g) Trial-Ready Date

(1) The parties agree that the case will be ready for trial on or after 10/01/05.

(2) A final pretrial conference should be held on or before 09/10/05.

(h) Insurance Carriers/Indemnitors

List all insurance carriers/indemnitors, including limits of coverage of each defendant or statement that the defendant is self-insured.

Information is currently unavailable. Defendant will supplement this report as soon as possible.

(i) Settlement

(1) The parties will have discussed settlement before the December 10, 2004 initial pretrial conference. The plaintiff shall make a written demand for settlement and defendant shall make a written response to the plaintiff's demand.

(2) The parties believe that a settlement conference is appropriate and should be scheduled by the Court before 05/15/05.

(3) The parties have discussed whether alternative dispute resolution (ADR) will be helpful to the resolution of this case and recommend the following to the Court: The parties do not believe ADR will be helpful to the resolution of this case.

(j) Trial by Magistrate Judge

(1) The parties will not consent to jurisdiction by the Magistrate Judge pursuant to Title 28, United States Code, Section 636(c).

Date: November 23, 2004

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Date: November 23, 2004

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